No. 12555

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LEONARD WOYNICZ, also known as Leonard Woynicz Sianozecki,

*Appellant,*

*vs.*

ALEXANDRA WOYNICZ, also known as Alexandra Woynicz Sianozecki,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### Jurisdictional Statement.

THE PLEADINGS:

The Amended and Supplemental Complaint [Tr. 20, 23-24, 3] alleges plaintiff to be a citizen of New York, defendant to be a citizen of California, founds cause of action on a written contract payable in installments, amount of demand: $6,180, exclusive of interest.

The Answer admits defendant is not a resident of New York, avers defendant is a resident of Florida.

Findings of Fact and Conclusions of Law [Tr. 33-35] finds every allegation contained in the Complaint to be true.

It is believed that 28 U. S. C. A., Section 1332, and 28 U. S. C. A., Section 1291, sustain the jurisdiction of the District Court and the appellate jurisdiction of this Court.

## Statement of the Case.

SUMMARY:

Plaintiff's Amended and Supplemental Complaint, hereinafter referred to as the "Complaint," alleged that on September 22, 1942, she and defendant, as husband and wife, entered into a written contract providing for payment to the wife of weekly installments of $50, that the agreement, which is incorporated by reference [Tr. 3-10], provided for registered mail notice of default; that defendant prior to April 1, 1947, notified plaintiff in writing that he was "repudiating" the agreement and that because of this plaintiff sent no notices of default and that such notices were waived; that defendant owes $6180 for back installments and praying for judgment.

Defendant's Answer [Tr. pp. 11-17] denied all the allegations of the Complaint, except plaintiff's place of residence, suggested failure of the Complaint to state a cause of action, said the agreement was void as contrary to public policy and had been wrongfully procured while defendant was mentally ill and that defendant did not understand the agreement when executed.

On behalf of the plaintiff, the defendant was examined and five depositions introduced—plaintiff's to the sole effect she had not married since the agreement was executed, and those of her attorney, the attorney who had represented the husband, that attorney's associate, and the deposition of defendant. All evidence for plaintiff was by depositions, all brought up in the record here.

On behalf of the defendant, the defendant, his adult daughter and adult nephew testified in court, and also a psychiatrist. The psychiatrist who had twice examined

defendant, gave his opinion that defendant had been mentally incompetent when the agreement was executed and had remained incompetent until 1947 when he began to improve—with the further opinion that defendant had not recovered. No expert evidence on the question of competency was introduced by plaintiff. Neither was any testimony as to defendant's competency given, on behalf of plaintiff, by anyone who had known defendant intimately. Plaintiff, by deposition, did not testify on the point.

The findings adopted by the court [Tr. 33-34] consist of a statement that each and every allegation of plaintiff's complaint is true, that defendant understood the agreement, and was mentally competent, that no fraud was practiced, and that he made weekly payments under the agreement for four years with knowledge of the agreement and nature of the payments. The Conclusions of Law [Tr. 34, 35] say that plaintiff is entitled to judgment for $6180 and interest, and that the defenses set forth in the answer are without merit. The Complaint and Findings are silent as to whether the husband and wife were living together at the time the agreement was made. The findings and conclusions are silent as to whether the notice of default was waived.

Defendant made motion to amend findings and make findings more certain and objected to findings [Tr. 28-31], and moved for new trial [Tr. 25-27]. Both motions were denied [Tr. 31-32]. Judgment entered for plaintiff [Tr. 36-37]. Defendant appealed, from the judgment and from the orders denying the motions [Tr. 38].

Detailed Statement of Case:

Called as witness for plaintiff, the defendant husband testified [Tr. 42 to 58] that he married the plaintiff in 1916, that in July or August of 1942 the wife filed action against him for a separation, that thereafter there were negotiations for a settlement, he identified the separation agreement as bearing his signature and it was received in evidence, Plaintiff's Exhibit No. 1 [Tr. 44-53]. He further testified that thereafter the action was dropped by his wife and that he went to Florida in the early part of 1947, that he paid $50 per week under the agreement until May 1947, and thereafter he paid $50 per month. He identified a letter, Plaintiff's Exhibit No. 2 [Tr. 55-57], and testified that it had been sent with his consent to the plaintiff from the lawyers representing him in Florida. He admitted that the schedule of payments in Exhibit B to the Complaint [Tr. 23] was correct. The deposition of plaintiff was received in evidence [Tr. 61-62]. She testified she had never remarried since the execution of the separation agreement. Plaintiff rested.

In opening statement, defendant's counsel mentioned the difference between void and voidable contracts where incompetents were involved and that separation agreements must be fair and between competent parties [Tr. 63]. Testifying on his own behalf [Tr. 63 to 106] defendant said he was born in Poland in 1885, came to this country in 1911, did not speak English then, brought his wife here in 1916 from Russia, that he was nine years older than she; that in 1941 he learned of the death of a brother in Poland who had died in a horrible way, that "when the case came to court where my wife sue me for separation, it was such injustice. It was everything was false—" [Tr. 66].

"Mr. Weber: Just a minute, just a minute.

The Witness: All accusations was false.

Mr. Weber: Just a moment, Mr. Woynicz. I believe the question was something in connection with the news of your brother's death in 1941.

The Witness: That comes altogether. That is my wife—"

He testified the news of his brother's being killed in Siberia made him depressed, that defendant's son went into the service in 1940, that in June, 1941, defendant had an operation for appendicitis, complicated by peritonitis, and after the incision opened he had to wear the plate because his intestines would come out. In March, 1942, he had an operation to repair the hernia, and then his gall bladder was removed, that he worked for New York Thread Grinding Corporation, and because his intestines used to come out, the doctor forbid him to ride the subway, so he moved to walking distance of the shop; that he was served with papers in August, 1942, and because "all the accusations was false I thought I would drop dead. I was working 16 hours a day, and they accused me that I was talking with the women." [Tr. 68.] He couldn't sleep at that time, and was concerned about his son who was in the service, he would cry, had trouble with muscular trembling, couldn't hold anything in the stomach. He would lose his way to the shop although he was familiar with his way there. People would talk to him and he couldn't understand what they were talking about. He would burn himself because he would forget you couldn't put water in liquid fire. He talked to God that he be killed. He thought he was insane because he could not understand what was going on. He took the papers to a lawyer named Zimmerman, who had been

recommended by his partner. He kept talking about the Moscow trials to his lawyer. He had pains in the head, stomach and the headache. He did not understand the agreement, but understood part of it. When he first got the papers he called the wife's attorney, Klaw, and asked him if it was a joke. He was under doctor's care at this time. The doctor gave him pills to make him sleep. He thought about his father who had committed suicide. He had trouble understanding what Mr. Zimmerman said to him. Many times he had lapses of memory. He was ashamed. He was shivering all the time. He was continually under doctor's care from 1942 until 1947 when he went to Florida. He got upset when his wife wouldn't go with him to see their son who was about to be shipped overseas. About September, 1942, he hoped a train would kill him, and he considered dynamite—"And so I considered if I would have peace if I committed suicide that way, and it would be no trouble to bury me no more. I would be disintegrated entirely." [Tr. 83.] In response to a question by the court, he said he served four and a half years in the Turkish Army, Central Asia.

On cross-examination, the witness testified in some detail concerning the circumstances surrounding the actual execution of the agreement.

Attorney for defendant suggested that the letter from the Florida attorneys [Tr. 55 to 57] had amounted to a disaffirmance of the agreement after a restoration to capacity [Tr. 78].

Edmund George Tanner [Tr. 106-114], testifying for the defendant, said defendant was his uncle, he associated with him from 1940 to 1943, when Tanner worked for him at New York Thread Grinding Corporation, where

defendant was president. He had frequent contact with defendant. As a subcontractor, he had to get heat treating done by defendant. About August, 1942, he gave parts to defendant to be heat treated, but defendant forgot about them. This happened on several occasions. Once he went off to look for something for the witness, and forgot that he had left witness waiting. Defendant had a habit of being hard of hearing, had many lapses of memory, would not answer, would fail to recognize his nephew at times, would engage in political discussions against the Russian regime, would complain of being very tired.

Wanda Woynicz Kuhrke testified for defendant [Tr. 115-137] at some length. She is his daughter. His health was bad and he was upset over domestic troubles. Defendant told her the pressure of the whole situation was so severe that he felt he was going out of his mind. That he just didn't know which way to turn. He couldn't sleep. He frequently cried. He told her his father had committed suicide, and he thought that would probably help him out of his troubles. He seemed worn out. He became very nervous and his hands shook. He had a peculiar nerve reaction in his cheek which would twitch rather violently at times. He told the witness that he felt that since so many people were killed in accidents every day, that he should be one of them. He talked to her about going to see Zimmerman, the attorney. He mentioned the Moscow trials. He told witness that he would like to jump in front of a train and kill himself. He mentioned blowing himself up, or killing himself in some way. He said God probably was not just to him. In the opinion of the witness, the defendant was mentally incompetent in August and September, 1942, and she

was intimately acquainted with him at the time [Tr. 129-130]. On cross-examination she testified that she didn't think he has fully recovered.

Dr. Walter Z. Baro, testifying for plaintiff, stated his qualifications as a specialist in mental and nervous diseases. He examined defendant in May, 1949, and again in March, 1950. He took a history to which he testified in detail [Tr. 139, 140, 141, 143]. When the doctor examined the defendant in March, 1950, he started to cry during the examination and said, "I wish God would kill me. My father committed suicide. I don't think he did the wrong thing." [Tr. 143.] In response to a hypothetical question as to the defendant's mental condition during the month of September, 1942, Dr. Baro replied:

> "My opinion is that the man, due to external influences, developed severe nervousness, and finally developed what we call in mental and nervous diseases a reactive depression. That means a depression and reacting due to facts which have influenced him in that particular time. And a reactive depressive patient is a patient who very frequently will commit suicide. He not only talks about it, but has lost at that particular time the facts of reality. These patients do not live in reality. And in my opinion, that was his mental condition at the time in 1942." [Tr. 145.]

In regard to his mental condition between 1942 and 1947, the doctor stated that he probably slightly improved during that time, but that he did not think defendant recovered.

On cross-examination the doctor testified that he didn't think that the defendant in September, 1942, had the mental capacity to read a newspaper and understand it.

But that a mental patient of this kind could continue routine duties, something that he has been doing for years, automatic. That in his opinion the alimony suit of the wife produced mental illness. That the doctor did not believe that the defendant understood the ultimate result and ultimate effects of the separation action. That his hatred against his wife tended to show the patient's incompetency. The doctor believed that the patient knew he was signing something, but that he did not know the ultimate results.

All the depositions were introduced in evidence and later read into the record on the motion for new trial [Tr. 223-326].

On argument counsel for defendant again suggested that the agreement had been rescinded, and that an incompetent could not be estopped by his own acts [Tr. 171]. That the agreement was contrary to public policy [Tr. 172]. That separation agreements must be fair [Tr. 172]. That the uncontradicted testimony of the expert ought not be disregarded [Tr. 172].

The court said there was no question under the evidence that the cause of action alleged in the complaint was established.

On defendant's motion to amend findings, and to make findings more certain, and objections to findings [Tr. 28, 29, 30, 31], and on the motion for new trial [Tr. 25], counsel suggested that the proposed findings did not comply with Rule 52, Federal Rules of Civil Procedure: ". . . the court shall find the facts specially and state separately its conclusions of law thereon. . . ." [Tr. 178.] Further objection was taken of the failure of the court to construe the agreement [Tr. 178]. That it had

to be done because of the public policy questions involved [Tr. 178, 179 and 183, 184, 185, 186, 187]. That in incapacity cases, there are two kinds—a person without understanding, and a person not entirely without understanding but of unsound mind [Tr. 189]. That the uncontradicted expert testimony of a psychiatrist ought not to be ignored [Tr. 189]. That the mention of payments in the findings was out of place unless the court was holding that there was an estoppel of the incompetent [Tr. 192]. That there was a rescission between the parties [Tr. 193]. That the evidence presented by defendant had reached a point where the burden was cast on plaintiff [Tr. 193], because defendant had made a *prima facie* showing of unsound mind [Tr. 194; and also 195, 196]. That the court should have stated in findings what was the effect of the Florida letter—did it excuse the admitted failure of the plaintiff to serve registered notice of default, or was it a rescission [Tr. 195]? Point was also made that the findings did not find all the facts necessary to a valid separation agreement between husband and wife [Tr. 195]. Counsel for the plaintiff then explained the findings at some length [Tr. 196-201]:

> "The Court: After reconsidering the proposed findings of fact and conclusions of law and judgment, the court has reached the conclusion that they refer to certain paragraphs in the complaint which contain allegations of fact involving the determination that the court made in deciding the case very clearly and explicitly, and counsel for the plaintiff this morning has very clearly and logically explained the contents

of these proposed findings and coupled them with the allegations of the complaint which are allegations of fact involved on the questions raised.

"The court adopts the views expressed here by counsel for the plaintiff, that this is a specific and fair proposed findings of fact and conclusions of law, and for that reason the objections to the proposed findings of fact and conclusions of law will be denied. . . ." [Tr. 201, 202.]

On the motion for new trial, counsel raised the insufficiency of evidence to justify the decision [Tr. 207]. Mentioned again the importance of expert testimony when uncontradicted [Tr. 207, 212]. Discussed the depositions [Tr. 208-209]. The distinction between totally without understanding and unsound mind [Tr. 210]. The question of rescission [Tr. 212]. The burden of proof [Tr. 212]. The public policy questions [Tr. 212, 214, 215, 217, 218, 219, 220]. That the court had erred in interpreting the agreement [Tr. 213, 214]. The failure of the complaint to allege that the parties were separated when the agreement was made, or that they separated afterward [Tr. 218].

The court then granted leave for counsel to read the depositions into evidence [Tr. 221]. After the reading of the depositions, counsel discussed the contents [Tr. 328]. Pointed out to the court that transactions between husband and wife have to be scrutinized more closely than arm's length agreements [Tr. 330]. Motion for new trial denied.

## Specification of Errors.

In Regard to the Incompetence of Defendant:

1. The finding of the court that the defendant was competent, in the face of the uncontradicted testimony of the psychiatrist that the defendant was mentally ill, was an abuse of judicial discretion [Tr. 172, 26, 189, 193, 194, 335].

2. It is believed that the ruling of the court on the question of incompetency was based on a misconception of the law, the misconception being that only a person totally without understanding is entitled to protection on that ground, while a person of unsound mind is not [Tr. 63, 189, 194, 195, 210, 336].

3. That the trial court failed to recognize that upon a *prima facie* showing that defendant was of unsound mind, then the burden of proof shifted to the plaintiff [Tr. 193, 194, 212].

4. That the court failed to give adequate consideration to the common law and statutory presumptions regarding the invalidity of transactions between husband and wife, coupled with evidence that one of the parties was of unsound mind at the time of the transaction [Tr. 172, 173, 336].

In Regard to Defendant's Contentions That the Agreement Was Contrary to Public Policy:

5. Agreement contrary to public policy because paragraph Eighth thereof [Tr. 49], read together with other paragraphs, would seem to amount to a contracting away of the right to judicial redress, and hence to alter the incidents of the marriage [Tr. 11, 15, 63, 172, 178, 179, 183, 184, 335].

6. Agreement contrary to public policy because it can be construed as offering a bonus to the wife if she will procure a divorce from her husband, rather than the separation sued for [Tr. 11, 15, 184, 185, 186, 187, 335].

7. Agreement contrary to public policy because paragraph Ninth thereof [Tr. 49, 50], read together with other paragraphs, attempts to put the agreement beyond the reach of any court, and hence infringes on the jurisdiction of the courts [Tr. 11, 15, 172, 178, 179, 183, 186, 187].

8. That the plaintiff failed to sustain the burden of proof which was his to show, in order to escape having his agreement declared to be against public policy:

   (a) That the agreement was fair and reasonable at the time of its execution and

   (b) That the parties were separated prior to the making of the agreement [Tr. 11, 15, 63, 33, 34, 35, 326, 330].

In Regard to the Findings and Conclusions:

9. That the findings and conclusions are objectionable in that they are too indefinite and do not comply with Rule 52a, F. R. C. P.; attempt to incorporate complaint, answer and exhibits, by reference, as well as oral statements of counsel for plaintiff, is fatal—court erred in denying motion to amend and make certain [Tr. 28, 29, 30, 178; and particularly 196-201, 336].

10. That the findings and conclusions are insufficient to support the judgment because:

    (a) No finding or conclusion is made as to whether or not the agreement was fair and reasonable at the time of its execution [Tr. 195].

    (b) No findings or conclusion is made as to the way the court construed the agreement [Tr. 178, 183, 184, 185, 186, 187].

    (c) No finding is made as to whether the parties were separated at the time of making the agreement [Tr. 11, 218, 219].

    (d) No conclusion is stated as to whether the agreement is contrary to public policy [Tr. 11, 15].

    (e) The findings are ambiguous and inconclusive as to the effect of making the payments over the four-year period [Tr. 192, 193, 41].

11. That the findings and conclusions are inadequate in that notwithstanding the requirement of paragraph Tenth of the agreement for registered mail notice of default, no finding or conclusion is made as to whether the letter from the defendant's Florida attorneys served to excuse and waive the requirement of registered mail notice of default, admittedly not given defendant, or whether the letter amounted to a rescission [Tr. 8, 55, 195, 336].

12. That the evidence is insufficient to support either the findings or the judgment [Tr. 336].

## Arguments—Incompetence of Defendant.

ARGUMENT AS TO SPECIFICATION NO. 1:

> "The finding of the court that the defendant was competent in the face of the uncontradicted testimony of the psychiatrist that the defendant was mentally ill, was an abuse of judicial discretion [Tr. 172, 26, 189, 193, 194, 335]."

EFFECT OF UNCONTRADICTED EXPERT MEDICAL EVIDENCE:

On the question of weight of evidence, burden of proof, and presumptions, the decisions of the state where the trial is had are controlling. (*Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; *Metropolitan Casualty Insurance Co. v. Smith and Smith* (C. C. A. 9th, Wash.), 58 F. 2d 699.)

A discussion of the California rule on expert testimony is found in *William Simpson Co. v. Ind. Acc. Com.,* 74 Cal. App. 239, 240 Pac. 58. Medical testimony was involved. The court said at 74 Cal. App. 243:

> "The rule . . . appears to be that whenever the subject under consideration is one within the knowledge of experts only, and it is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases, neither the court nor jury can disregard such evidence by experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses."

In *Wirz v. Wirz* (1950), 96 A. C. A. 172, 214 P. 2d 839, there was a question of manic depressive insanity. The court stated that the rule that uncontradicted testimony of a witness, in no way impeached or discredited,

may not be arbitrarily disregarded applies also to medical expert opinion evidence, citing *Mantonya v. Bratlie,* 33 Cal. 2d 120, 127, 199 P. 2d 677, 681, and *Levey v. Minott,* 214 App. Div. 192, 211 N. Y. Supp. 883. In *Levey v. Minott,* op. cite., there was an action for breach of promise. Defense—insanity. Verdict for the plaintiff. Reversed. The court said, at 214 App. Div. 194:

> "One of the medical experts called on behalf of defendant described his malady as 'manic depressive insanity,' the characteristics of which are that attacks recur at regular intervals lasting for several months, while at other times the patient is normal; and while the condition is accompanied by delusions, it also distorts and warps every mental process, and during the period of 'manic depressive' condition the patient is not able to realize the meaning and significance of words or acts, even when conscious of the words and the acts themselves. His insight is destroyed; he is easily led and his emotional equilibrium is unsettled. This manic depressive malady differs from other forms of insanity because in other forms acts not directly connected with the particular delusion may be rational and valid. That he suffers and has suffered from this malady, the evidence leaves no doubt . . . while the jury might not have believed Fourette, who testified that he was her paramour, they should not have disregarded this medical proof. Upon the proof of defendant's insanity . . . the verdict is totally against the evidence. . . ."

In other words, where you have a medical condition that laymen do not know about, the uncontradicted testimony of a qualified doctor is binding on the court. That is, unless it appears that the doctor is not worthy of belief. In the case at bar, the question was: Was defendant of unsound mind? Dr. Baro testified that defendant was suffering from a mental disease which he termed a "reactive depression." Is mental disease within the common knowledge of laymen? Is the particular mental disease called a "reactive depression" within the common knowledge of laymen? Of all of the things that have defied the efforts of man to find out anything about them, the human mind stands at the top of the list. A psychiatrist with years of schooling and actual experience in psychopathic wards of hospitals will have learned something. We would probably require a mechanic with at least six weeks at a trade school to tell us anything about the workings of an automobile engine. And the law is just as wise when it requires, as the rulings in *William Simpson Co. v. Ind. Acc. Com.,* 74 Cal. App. 239, 240 Pac. 58; and *Wirz v. Wirz,* 96 A. C. A. 172, 214 P. 2d 839, do require, that we be told as to disease of the human mind by one who knows something about it.

If more than one expert is produced, and they disagree —that is something else again. Or if the expert produced is found by the court to be unworthy of belief, then the court can make a finding to that effect, and go ahead and decide the case, or, to be on the safe side, appoint an expert to testify on behalf of the court. As appears from the transcript, only one expert was produced,

Dr. Baro. On the face of the record, he seems worthy of belief. The trial court has not made any indication that he is not. Dr. Baro testified that the defendant was suffering from "reactive depression," a mental disease often causing suicide. Such a person is not of "sound mind"! No expert was produced to contradict Dr. Baro. Consequently, Dr. Baro's testimony is binding on the issue.

Argument as to Specification No. 2:

> "It is believed that the ruling of the court on the question of incompetency was based on a misconception of the law, the misconception being that only a person totally without understanding is entitled to protection on that ground while a person of unsound mind is not. [Tr. 63, 189, 194, 195, 210, 336.]"

The test is, "Was the party mentally competent to deal with the subject before him with a full understanding of his rights?" (*Pomeroy v. Collins,* 198 Cal. 46, 243 Pac. 657; *Union Pac. Ry. Co. v. Harris,* 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003; *Carr v. Sacramento C. & P. Co.,* 35 Cal. App. 439, 170 Pac. 446.)

Dr. Baro said that the defendant was suffering from "reactive depression" and that "these patients do not live in reality." [Tr. 145.]

The distinction to which appellant is pointing is well expressed in California Civil Code, Sections 38 and 39:

> "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him

necessary for (1) his support, or (2) the support of his family." (Cal. Civ. Code, Sec. 38.)

"A conveyance or other contract of person of unsound mind, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code." (Cal. Civ. Code, Sec. 39.) (Note: Defendant contended on trial that Plaintiff's Exhibit No. 2, Tr. 55, 56, 57, had amounted in law to a notice of rescission. [Tr. 193, 197.] And that since plaintiff had to plead the letter to make a case, defendant did not have to plead it. [Tr. 195.] (*McNeese v. McNeese,* 190 Cal. 402, 213 Pac. 36).)

New York Real Property Law, Section 11, provides:

"A person other than a minor, an idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest."

New York General Construction Law, Section 38, Article 2, provides:

"The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy."

In other words, it is recognized in New York that one may be of unsound mind and still not be totally without understanding—and yet be entitled to protection. (*Riggs v. American Tract Soc.,* 95 N. Y. 503, 512; *Coakley v. Coakley,* 163 Misc. 867, 293 N. Y. Supp. 421; *In re Morgan,* 7 Paige (N. Y.) 236; *Aidkens v. Roberts,* 164 N. Y. Supp. 502.)

It is submitted that the trial court based its result on the admitted fact that the defendant had some understanding at the time of the ransactions, even though suffering from mental illness.

Argument as to Specification No. 3:

> "That the trial court failed to recognize that upon a *prima facie* showing that defendant was of unsound mind, then the burden of proof shifted to the plaintiff. [Tr. 193, 194, 212.]"

Upon the presence of Dr. Baro's uncontradicted testimony, the burden shifted to the plaintiffs. (*Orsini v. Metropolitan Life Ins. Co.,* 9 N. J. Misc. 407, 154 Atl. 201; *Aikens v. Roberts,* 164 N. Y. Supp. 502; *Livingston v. Safe Dep. & Trust Co.,* 157 Md. 492, 146 Atl. 432.)

Argument as to Specification No. 4:

> "That the court failed to give adequate consideration to the common law and statutory presumptions regarding the invalidity of transactions between husband and wife, coupled with evidence that one of the parties was of unsound mind at the time of the transaction. [Tr. 172, 173, 336.]"

> "Equity will, in general, relieve a husband from his contracts with, or conveyance or transfer to, his wife, obtained by her fraud, undue influence, overreaching of him, etc., by means of her confidential relation with him, especially when the circumstances are such that the husband is dependent on the wife and so aged and weak in mind and body that he may

> easily be subjected to her undue influence, overreaching, etc.; and in such a situation, it has been held, a conveyance or transfer from him to her will not be sustained or enforced without affirmative proof that his act was intelligently done without undue influence." (26 Am. Jur. 878.)

In other words, a man who is suffering from mental disease, a "reactive depression" [Tr. 145], working 16 hours a day [Tr. 68], physically worn out [Tr. 121], and in his late fifties [Tr. 64], should have some protection against a wife who is 9 years younger [Tr. 65]. The plaintiff wife did not testify as to his mental and physical condition at the time he signed the paper and in the months before that. Only the depositions of Zimmerman and Simon are offered. Admittedly these lawyers did not know the husband before August, 1942. Between then, and September 22, 1942, they only saw him briefly a few times. They never knew him when he wasn't sick. Their depositions seem inadequate as affirmative proof that the agreement was entered into without advantage having been taken of the husband.

It seems to counsel that the absence of one word in the record from the wife as to the mental and physical condition of her husband during the months which led up to the agreement is an omission which should not be overlooked.

## Arguments—Public Policy.

ARGUMENT AS TO SPECIFICATION No. 5:

> "Agreement contrary to public policy because paragraph Eighth thereof [Tr. 49], read together with other paragraphs would seem to amount to a contracting away of the right of judicial redress, and hence to alter the incidents of marriage [Tr. 11, 15, 63, 172, 178, 179, 183, 184, 335]."

Paragraph Eighth of the agreement [Tr. 49] says that "If the Husband defaults . . . the Wife shall have the right to bring an action either for legal separation or for support and maintenance or for both . . ." And may ask for alimony and attorney fees. Does this mean that so long as the husband is not in default, the wife may not bring such an action? If that is the intent of the agreement, it is contrary to public policy. (*Armstrong v. Armstrong,* 1 N. Y. S. R. 529; *Berg v. Berg,* 366 Ill. 228, 8 N. E. 2d 623; *Gatliff Coal Co. v. Cox,* 142 F. 2d 876; *Van Orden v. Van Orden,* 8 Hun. (N. Y.) 315.)

ARGUMENT AS TO SPECIFICATION No. 6:

> "Agreement contrary to public policy because it can be construed as offering a bonus to the wife if she will procure a divorce from her husband, rather than the separation sued for. [Tr. 11, 15, 184, 185, 186, 187, 335.]"

Even if the agreement did not intend to bar litigation, it is objectionable as a bonus agreement. (*Trust Co. of America v. Nash,* 50 Misc. 295, 98 N. Y. Supp. 734. See argument Tr. 184, 185, 186.)

Since the court could not modify it, according to its terms, and since there was no limitation on the total amount, it amounted to this: the wife was to have as a

bonus all of the benefits under the agreement, including the $50 per week payments. This bonus was to be in addition to whatever the court might award her in a divorce action. Such an arrangement might well encourage divorce.

Argument as to Specification No. 7:

> "Agreement contrary to public policy because paragraph Ninth thereof [Tr. 49, 50] read together with other paragraphs attempts to put the agreement beyond the reach of any court and hence infringes upon the jurisdiction of the courts. [Tr. 11, 15, 172, 178, 179, 183, 186, 187.]"

The court can not be divested of its power to modify. (*Kraunz v. Kraunz,* 293 N. Y. 152, 56 N. E. 2d 90; *Pignatelli v. Pignatelli,* 169 Misc. 534, 8 N. Y. S. 2d 10.)

Argument as to Specification No. 8:

> "That the plaintiff failed to sustain the burden of proof which was his to show, in order to escape having his agreement declared to be against public policy: (a) That the agreement was fair and reasonable at the time of its execution, and (b) That the parties were separated prior to the making of the agreement [Tr. 11, 15, 63, 33, 34, 35, 330].
>
> "A separation agreement must be untainted by fraud, must be in all respects fair, reasonable, and just in view of all the circumstances of the parties at the time, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." (17 Am. Jur., Divorce and Separation, Sec. 724, p. 544; *Beard v. Beard,* 65 Cal. 354; *McIntyre v. McIntyre,* 4 Misc. 252, 30 N. Y. Supp. 200; *Helvering v. Leonard,* 60 S. Ct. 780, 310 U. S. 80, 84 L. Ed. 1087.)

## Arguments—Findings and Conclusions.

ARGUMENT AS TO SPECIFICATION No. 9:

> "That the findings and conclusions are objectionable in that they are too indefinite and do not comply with Rule 52a F. R. C. P.; attempt to incorporate complaint, answer, and exhibits, by reference, as well as oral statements of counsel for plaintiff, is fatal—court erred in denying motion to amend and make certain. [Tr. 28, 29, 30, 178, but particularly 196-201, 336.]"

The findings [Tr. 33, 34, 35] say, "That each and every allegation contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX of plaintiff's amended and supplemental complaint herein, is true." Then they go on to say that the defendant was competent, and that no fraud was practiced upon him, and that he made payments under the agreement with knowledge of it, and what the payments were for.

It is submitted that the attempted incorporation of the complaint by reference into the findings is not a compliance with rule 52a, F. R. C. P., which provides, in part, "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

Judge Nordbye has this to say of such findings:

> "Some judges have followed the practice of adopting certain portions of the complaint and answer, as the case may be, in drawing their findings, and proceed by stating, 'I find Paragraphs 1, 2, 3, 4, etc. . . . of the complaint to be true,' and then set forth their conclusions of law. Well, I doubt that this practice complies with Rule 52, and I question its wisdom. It is not a very judicial way of disposing

of a case. It smacks of a short-cut procedure, of undue haste, and the disposition of the controversy without due consideration. Then, again, the complaint or answer may contain evidentiary matters . . . I doubt that any one of us is so overburdened with work that he cannot spend the extra time which will dispose of the litigation in a good, workmanlike manner." (Article, Improvements in Statement of Findings of Fact and Conclusions of Law, Hon. Gunnar H. Nordbye, 1 Fed. Rules Dec. 25, at pp. 30, 31.)

In *Brooks Bros. v. Brooks Clothing of Calif., Ltd.,* 5 Fed. Rules Dec. 14, the court said,

"An analysis of the Findings and Judgment by counsel will show readily what, if any changes I have introduced in each paragraph. In some instances I have eliminated verbiage which I thought was surplusage. Even as rewritten, the findings are longer than we have been accustomed to in the past. But, all findings, at the present time, are, of necessity such. For the Supreme Court in Schneidermann v. United States, 320 U. S. 118, 129, 63 S. Ct. 1333, 87 L. Ed. 1796, has ruled that findings of ultimate facts—as we were taught by the older authorities—are no longer sufficient.

"And, following the Schneidermann decision, the Ninth Circuit Court of Appeals sent back to me a similar case (United States v. Bergmann, 1942, 47 F. Supp. 765) in which I had made findings in the language of the allegations of the Complaint and negatived certain defenses in the language of the Answer—the orthodox way which, in California, we have followed for many, many years, both in state and federal practice.

> "The order of the Circuit Court was that I made the findings conform to the ruling in the Schneidermann case. This I did, by, in effect, epitomizing all the evidence in the case. That this is what the court expected is evidenced by the fact that no question of their sufficiency as to form was raised afterwards. And the appeal was decided on the basis of the facts which I set forth."

See also, Article, Findings in the Light of Recent Amendments, Hon. Leon R. Yankwich, 8 Fed. Rules Dec. 271, and particularly the quotation from the letter of the Librarian of the Ninth Circuit Court of Appeals which appears in footnote 10, 8 Fed. Rules. Dec. at 285. The findings at bar are too general. (*Knapp v. Imperial Oil & Gas Products Co.,* 130 F. 2d 1; *Smith v. Dental Products Co.,* 168 F. 2d 516.)

But there is more to the findings than the document itself [Tr. 33, 34, 35] and the Amended and Supplemental Complaint [Tr. 20, 21, 22, 23, 24] and Exhibit "A" to Original Complaint [Tr. 3, 4, 5, 6, 7, 8, 9, 10] and the Answer [Tr. 11, 12, 13, 14, 15, 16, 17]—all of which are attempted to be incorporated into the findings. Something else happened to further confuse the findings. Arguing against the Motion to Amend Findings and to Make Findings More Certain and Objections to Findings, counsel for the plaintiff "explained them" [Tr. 196, 197, 198, 199, 200, 201]. This would have probably been all right, but in ruling against the motion, the judge expressly adopted the explanation made by counsel for the plaintiff [Tr. 201, 202]. So now to find out just what the findings are, it is necessary not only to refer to the Complaint, its exhibit, and the Answer, but also the argument of counsel for the plaintiff, and the judge's ruling on the motion.

Counsel for defendant does not wish to labor what might be called a technical objection, but it is felt that the trial court misunderstood the law to be applied to the case. Moreover, the findings in their present form make it difficult, if not impossible, to determine just what facts were found. The conclusions are so broad that it is hard to say just what the judge thought the law to be. It is felt that the purpose behind the mandatory requirement of findings in Rule 52, F. R. C. P., is to tie down the facts found, together with the law, in much the same way jury instructions and verdict are tied. This gives the court on appeal something to hang onto. It also gives the losing litigant a better idea of why he lost. In the long run, specific findings, separately stated, probably reduce the number of appeals. (*Mayo v. Lakeland Highlands Canning Co.,* 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774; *Kelley v. Everglades Drainage District,* 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485.)

Argument as to Specification No. 10:

> "That the findings and conclusions are insufficient to support the judgment because: (a) no finding or conclusion is made as to whether or not the agreement was fair and reasonable at the time of its execution [Tr. 195], (b) no finding or conclusion is made as to the way the court construed the agreement [Tr. 178, 183, 184, 185, 186, 187], (c) no finding is made as to whether the parties were separated at the time of making the agreement [Tr. 11, 218, 219], (d) no conclusion is stated as to whether the agreement is contrary to public policy [Tr. 11, 15], (e) the findings are ambiguous and inconclusive as to the effect of making the payments over the 4 year period. [Tr. 192, 193, 41.]"

Considering (a), (b), (c) and (d) together, it is the view of defendant that findings should be made as to all the essential ingredients that go to make up a valid separation agreement in order to support a judgment. (*Lake v. Lake,* 136 App. Div. 47, 119 N. Y. Supp. 686.)

Considering (e), that defendant made the payments. This is set forth special. It is also alleged in the complaint. In light of the comments of the court at Tr. 176, counsel, in reading this finding, has always wondered if the court weren't saying in effect, "Your man was competent when he signed that agreement—but—well, if he weren't competent when he signed it—if he was of unsound mind, then because he made the payments for more than four years, he is estopped to deny the agreement." Counsel feels that neither the facts nor the law permit such a holding of estoppel. (*Anglo-California Bank v. Ames,* 27 Fed. 727.)

Argument as to Specification No. 11:

> "That the findings and conclusions are inadequate in that notwithstanding the requirement of paragraph Tenth of the Agreement for registered mail notice of default, no finding or conclusion is made as to whether the letter from the defendant's Florida attorneys served to excuse and waive the requirement of registered mail notice of default, admittedly not given defendant, or whether the letter amounted to a rescission. [Tr. 8, 55, 195, 336.]"

Paragraph IX of the Amended and Supplemental Complaint [Tr. 22] pleads the letter of repudiation [Plaintiff's Exhibit No. 2, Tr. 55-57]. It also pleads "the sending of such notice or notices was rendered unnecessary, useless and futile and was waived by the defendant." The allegation of waiver is a conclusion of law and should have been

so stated by the judge if he so found. Although the defendant contended that there had been a rescission as a result of the letter, the judge failed to find either way as to the matter. *McNeese v. McNeese,* 190 Cal. 403, 213 Pac. 36, seems to show a like example of a time when a trial judge took the view that, as a matter of law, a person of unsound mind only was not entitled to relief.

Argument as to Specification No. 12:

> "That the evidence is insufficient to support either the findings or the judgment. [Tr. 336.]"

All of the testimony offered to prove the plaintiff's case is in deposition form. All the evidence introduced is contained in the record (*The Natal* (C. C. A. 9th), 14 F. 2d 382, certiorari denied; *Dampskibs Aktieselsk Orient v. W. R. Grace & Co.,* 273 U. S. 748, 47 S. Ct. 449, 71 L. Ed. 872); this court then is in a position to review the depositions and is not bound by the findings of the trial court (*Nashua Mfg. Co. v. Berenzweig* (C. C. A., Ill.), 39 F. 2d 896; *Munro v. Smith,* 259 Fed. 1, 170 C. C. A. 1, reversing 243 Fed. 654; *Record v. Ellis,* 97 Kan. 754, 156 Pac. 712, L. R. A. 1916E 654, Ann. Cas. 1917C 822); and the court may exercise independent consideration as to the credence to be given the depositions (*Linn v. Blanton,* 111 Kan. 743, 208 Pac. 616; cases collected 5 C. J. S., Appeal and Error, Sec. 1660, p. 751, footnotes 86 and 87; *The Marsodak,* 94 F. 2d 339; *Wilson v. Cross & Co.,* 33 Cal. 60).

Counsel respectfully suggests that upon reading the record and reviewing the evidence contained in the depositions—the depositions that are the only evidence offered by the plaintiff—this court will gain a feeling of the truth.

On the whole, the record contains simply the rather depressing story of a hardworking man of mature years. How a long illness came after news of the murder of his brother. Complications set in from his operations. Domestic troubles grew until the mind could stand no more. Worry and overwork sought a release. The mind turned to suicide. Not a sound mind. But an unsound mind. And that is the mind which executed the agreement. That is the agreement on which the judgment rests. Should such an agreement be upheld?

Respectfully submitted,

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*Attorney for Appellant.*